

NO LONGER YOUR DECISION:

BRITISH COLUMBIA'S PROCESS FOR
APPOINTING THE PUBLIC GUARDIAN AND TRUSTEE
TO MANAGE THE FINANCIAL AFFAIRS OF INCAPABLE ADULTS



FROM THE OMBUDSPERSON

This investigation and the resulting report and recommendations focus on a statute-based administrative process that is still regularly used in British Columbia to declare adults incapable of making their own financial and legal decisions and to transfer the authority for making those decisions and control of the adults' finances and property to the Public Guardian and Trustee. This statutory "certificate of incapability" process is authorized in the *Patients Property Act*. Today it remains an important component of the system of adult guardianship in British Columbia.

The process has been recognized for a number of years as being outdated and failing to meet the requirements of a fair and reasonable procedure. It has not changed significantly in the past 50 years. It reflects not only an older approach to the treatment of mental health issues but also a pre-*Charter of Rights and Freedoms* approach to respecting the procedural rights of individuals.

In our report and through our recommendations we have looked at what needs to be done to ensure that the current process is changed to acknowledge the inherent autonomy of an adult and fully respect his or her rights in a process that assesses whether that autonomy should be diminished or removed. We adopted this approach because for some time we have been waiting for the *Patients Property Act* to be replaced by newer and better legislation that has still not been proclaimed. Many of the recommendations could be addressed by promptly bringing into force some of the sections of the *Adult Guardianship and Planning Statutes Amendment Act* that have been awaiting proclamation since 2007.

Adult guardianship is an important protective system in our province. One of the enduring challenges that we face as a society is to recognize that individuals acting with good will and good intentions in difficult circumstances cannot replace statutory authorization or procedural fairness; they can only supplement them. Implementing the changes recommended in this report will not only help those adults and their families who face a certificate of incapability process, it will, I believe, help all those who in good faith administer the process.

I am pleased that the majority of the recommendations in this report have been accepted by the Public Guardian and Trustee, the health authorities, the Ministry of Health and the Ministry of Justice. The implementation of these recommendations by the Public Guardian and Trustee, the health authorities and the Ministry of Health will result in practical improvements to the current process. It is, however, the acceptance of 11 of the 14 recommendations for legislative change made to the Ministry of Justice and its commitment to implementing those changes by or before July 1, 2014 that allows me to be cautiously optimistic that what has been a very long wait for a modern, procedurally fair adult guardianship process may finally be coming towards an end. Our office will, of course, supplement that cautious optimism with ongoing monitoring of the implementation of the recommendations that have been accepted by all the authorities.



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FROM THE
OMBUDSPERSON



EXECUTIVE SUMMARY

This investigation was initiated to examine the fairness of the process that results in the Public Guardian and Trustee being appointed to manage the financial affairs of adults for whom a certificate of incapability is issued by a health authority because they are determined to be incapable of making their own financial decisions. Concerns about the fairness of the process were raised with the Ombudsperson during the Ombudsperson's seniors' care investigation.

The adult guardianship process, of which certificates of incapability are a part, provides an important safety net for adults who become mentally incapable of making decisions on their own and who have not taken steps to plan in advance for another adult to act as their substitute decision-maker. It is what we as a society have identified as a protective and supportive mechanism to ensure vulnerable adults are not taken advantage of.

In British Columbia, adults can plan for a time when they might need help making decisions. This can be done through an enduring power of attorney, a representation agreement or an advance directive. Someone else, usually a family member, may also apply to the court for the authority to make decisions on the adult's behalf. Unfortunately, not everyone can or does plan in advance, and not everyone has someone willing to make decisions on their behalf. In these cases, the Public Guardian and Trustee can be appointed to manage an adult's financial affairs either by an order of the Supreme Court of British Columbia or by a certificate of incapability issued by a health authority. Both processes are governed by the *Patients Property Act* and are intended to assist and protect vulnerable adults who may be incapable and in need of support.

The certificate of incapability process provides a mechanism for adults to have a committee appointed if they have not planned in advance or do not have anyone in their life who is willing or able to act on their behalf.

The origins of the *Patients Property Act* are in the English *Lunacy Act* of 1890, which became part of the law of British Columbia in 1897. The British Columbia *Lunacy Act* was intended to provide for the care and committal of both the person and estate (financial affairs) of "lunatics." The *Lunacy Act* was repealed in 1962 and replaced with the *Patients' Estates Act*. The *Patients Property Act* that is in force in 2013 is to a large extent similar to the *Patients' Estates Act* of 1962.

The model for mental health care has changed dramatically since 1962. The large, centralized facilities that used to house the vast majority of mental health patients have been largely abandoned in favour of regional community-based care. Previously, certificates of incapability were mainly issued by the directors of psychiatric institutions to allow for the management of the financial or legal affairs of the institution's patients. In these situations, the person who signed the certificate was often the same person who was providing care to the patient. The provisions of the *Patients Property Act* made sense in this context – directors needed a way to manage the lives of the patients they were treating inside the institution outside the institution, and the certificate allowed for this. As a consequence of the closure of many of the beds in those types of psychiatric institutions, the use of certificates has expanded beyond hospitals and mental health facilities over the past few decades to those who live in residential care and to those who receive services and support in the community, including in their own homes. Quite simply, the world has changed but the certificate of incapability process has not.



There has been recognition of the need for change and effort to make this change happen. The *Patients Property Act* has been the subject of significant law reform efforts. The first major steps toward reform in British Columbia began more than 20 years ago in 1992. When law reform initiatives began in the early 1990s, one of the objectives was to replace the outdated *Patients Property Act* with a modern system for adult guardianship. Law reform was seen as necessary and long overdue, and the *Patients Property Act* was identified as vulnerable to a challenge under the *Charter of Rights and Freedoms* and as not providing adequate procedural safeguards.

Since 1992, despite these law reform efforts, the government, though it has enhanced the personal planning options available to British Columbians, has not modernized adult guardianship legislation.

The *Patients Property Act*

The *Patients Property Act* establishes mechanisms to appoint a guardian (a "committee") to make decisions on behalf of the incapable adult. Under the Act, there are two different kinds of committee: a committee of estate and a committee of person. A "committee of estate" can make decisions on financial and legal matters. A "committee of person" is authorized to make health care and other personal decisions.

There are also two different processes for becoming a committee – a court process and an administrative process. The *Patients Property Act* establishes that a person can become a private or public committee of estate or committee of person by a court order, following a hearing deeming the adult incapable of managing his or her affairs. The Act also establishes that the director of a provincial mental health facility or psychiatric unit can issue a certificate of incapability resulting in the Public Guardian and Trustee (PGT) becoming the adult's committee of estate.

Once appointed, a committee of estate has all the rights, privileges and powers regarding the estate of the adult as the adult had previously, including handling property, real estate and banking matters, entering into contracts, dealing with lawsuits, filing income tax returns and applying for pension benefits. The committee controls all of the adult's money. The *Patients Property Act* requires the committee to exercise its powers for the benefit of the adult and the adult's family.

The procedure for ending a committee's authority depends on how the committee was created. If created by court order, the authority can be ended by applying to the court to be declared no longer incapable. If created by a certificate of incapability, the authority can be ended by the adult being declared capable through a certificate issued by a director or by court order, and by being discharged from a mental health facility or psychiatric unit. The court can also replace the PGT with a private committee and the PGT can restore a pre-existing power of attorney or appointed representative (both of which are suspended when a certificate of incapability is issued).

Certificate Process

The decision to issue a certificate of incapability is a discretionary decision made by directors of provincial mental health facilities or psychiatric units as defined in the *Mental Health Act* and the people to whom they delegate that authority. While the *Patients Property Act* establishes statutory procedures for court appointed committees, there are no such procedures that must be followed to issue certificates of incapability. In the absence of statutory or regulatory procedures, the Public Guardian and Trustee (PGT), in consultation with other stakeholders, created non-binding guidelines for those involved in the certificate process.¹ The guidelines were created by the PGT to promote consistent procedures throughout British Columbia.

Public Guardian and Trustee as Committee

When the Public Guardian and Trustee (PGT) is appointed as committee to manage an adult's affairs, the adult becomes its client even though the status is involuntary on the part of the adult. The adult's property is then held in trust by the PGT. The PGT handles an adult's financial affairs by managing the adult's assets and the money payable to him or her, and by paying the adult's bills and expenses. When it feels it is possible, the PGT will minimize its involvement in day-to-day decisions and allow adults limited access to their bank accounts.

The PGT charges its clients for expenses incurred in administration of their estate.

Investigative Process

The public authorities involved in this investigation were the Ministry of Health, the Ministry of Justice, the Public Guardian and Trustee of British Columbia, the Fraser Health, Interior Health, Northern Health, Provincial Health Services, Vancouver Coastal Health and Vancouver Island Health authorities.

Our investigation included a review of legislation and regulations, both in British Columbia and across Canada, as well as meetings with the staff of each of the public authorities involved. We obtained and reviewed extensive information provided by each of the authorities involved in the investigation. In each of the health authorities, Ombudsperson staff interviewed two directors who issue certificates of incapability and two staff who conduct incapability assessments.² In total, 22 health authority staff were interviewed. We also met with and obtained input from advocacy organizations, practitioners and academics. Ombudsperson staff randomly selected and reviewed 67 files provided by the Public Guardian and Trustee and the health authorities where a certificate of incapability was issued in 2008 and in 2010.³

In a 10-year period, between 2002 and 2011 inclusive, 4,077 certificates of incapability were issued in British Columbia

¹ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 3 <http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf>.

² We interviewed one director and one assessor from the Provincial Health Services Authority (PHSA), as all certificates are issued by one director at the PHSA. The PHSA issues a relatively small number of certificates.

³ In total Ombudsperson staff reviewed 67 files. Of these, 57 include 5 files for each regional health authority from both 2008 and 2010 and 7 files from the Provincial Health Services Authority (the total number of certificates issued by the PHSA in 2008 and 2010). The other 10 files reviewed were files where the Public Guardian and Trustee was appointed committee of estate and the authority ended for a reason other than the adult's death.

The Office of the Ombudsperson considered the fairness and reasonableness of the certificate of incapability process during each of the steps in the process. We also considered the existing legal framework and whether it provides for a fair and reasonable process.

Reports to the Public Guardian and Trustee

The first step in the certificate of incapability process is a report to the Public Guardian and Trustee that an adult is being abused or neglected, or that there are concerns about how the adult's affairs are being managed. Reports may be made by an adult's family, friends, financial institution or others who interact with the adult; however, the majority of reports come from staff in the health authorities.

When a report is received, the PGT Guidelines state that an investigation should occur if there is a concern that the adult is in need of a substitute decision-maker or if an existing substitute decision-maker needs to be replaced.

In 2011, the PGT received over 1,500 reports. In the past five years, it investigated 82 per cent of the reports it received. Forty-one per cent of those investigations resulted in a certificate of incapability.

Notice of Investigation

Neither the *Patients Property Act* nor the *Public Guardian and Trustee Act* include any requirements that an adult or his or her family members be notified of a PGT investigation into the adult's incapability. The PGT guidelines state that the PGT will inform the adult of the investigation unless doing so will put the adult at risk. The letter that the PGT sends to adults and family members says that it has received a report about the management of the adult's affairs and "will be assessing the situation to determine whether you need the services of our office to help you with the management of these affairs." The letter does not include information about the purpose, steps, potential outcome, costs and implications of the PGT's investigation. This is inadequate when a finding of financial incapability will result in the PGT assuming control of all the adult's financial and legal decisions. I found that the Public Guardian and Trustee does not provide adequate information to adults about an investigation of the adult's financial incapability.

(R1) I recommended that the Public Guardian and Trustee provide written notice to all adults who are the subject of an investigation, at the start of an investigation, that includes:

- the steps that will occur during the investigation,
- the possible outcomes and their significance and
- an explanation that an adult can seek legal advice or assistance.

The Public Guardian and Trustee has accepted this recommendation.

Public Guardian and Trustee Investigation

An investigation by the Public Guardian and Trustee (PGT) determines whether the PGT should pursue a certificate of incapability in order to become committee of estate for an incapable adult.

When conducting an investigation where there is no substitute decision-maker in place, the PGT inquires into the capability of the adult as well as the need for protection, considering whether financial loss has already occurred or is likely to occur.⁴ For example, the PGT may look into whether or not bills are being paid and whether appropriate expenditures are being made.

Protection of Assets in Urgent Cases

The *Public Guardian and Trustee Act* gives the PGT authority to take measures to protect an adult's income or assets, such as instructing a bank to freeze an adult's account when it believes an adult's financial affairs, business or assets are in immediate need of protection. Since the PGT does not have authority to manage an adult's financial affairs while these measures are in place, adults are left in financial limbo until the instructions are withdrawn or until the PGT or another party obtains authority to act for the adult.

Although the *Public Guardian and Trustee Act* states that any steps taken remain in effect for seven days or a shorter period, the PGT reissues the instructions when further authority, for example, a certificate of incapability, is being explored. This means the financial limbo can last two to six months or longer. In the files we reviewed, the instructions were kept in place for an average of 45 days.

To determine whether the PGT has authority to reissue instructions to protect the assets of adults in urgent cases beyond the seven days, we considered the clear wording of the legislation and the context within which the PGT operates. I found that the Public Guardian and Trustee does not have the authority to extend the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

Even if the legislation was amended to extend the period or renewal options authorizing protective measures, there are still difficulties with relying on protective measures for the length of time that it may take to obtain a certificate of incapability. While protective measures are in place, the adult may be restricted from accessing his or her funds and the PGT can only direct funds to be used to protect or maintain health and safety. Authorizing the PGT to act as committee or property guardian for a temporary period would limit this impact.

Under Part 2 of the *Adult Guardianship Act*, which has not been brought into force, the PGT would be able to apply for a court order appointing the PGT as a temporary property guardian, if there is reason to believe the adult is incapable of making decisions about his or her financial affairs and an order is urgently needed to protect the adult's financial affairs from damage or loss. This court approved temporary guardianship would last for 90 days and allow the PGT to take most of the actions it would be able to take as a regular property guardian. It is unfortunate that these provisions, have not been brought into force. However, the resulting gap does not authorize the extension of the limited powers of section 19(3) of the *Public Guardian*

⁴ Public Guardian and Trustee of British Columbia, "Investigations, Assessment and Investigation Services," policy, September 2011, 6302.

and Trustee Act. If the legislature had intended to provide the PGT ongoing authority with such a profound impact on an adult's financial affairs, it would have used clear and explicit language.

(R2) I recommended that the Public Guardian and Trustee discontinue the practice of extending the period of seven days set out in section 19(3) of the *Public Guardian and Trustee Act*.

The Public Guardian and Trustee has indicated that it believes it does have statutory authority to extend the seven-day period set out in section 19(3) and has not accepted this recommendation.

(R3) I also recommended that the Ministry of Justice take steps to provide the Public Guardian and Trustee with access to a court process to apply to act as a temporary property guardian in urgent situations.

The Ministry of Justice has accepted this recommendation.

The Medical Assessment

The purpose of a medical assessment by a physician is to establish evidence for the basis of pursuing a certificate of incapability. Surprisingly, the *Patients Property Act* does not require that an assessment or opinion from a physician be obtained before a certificate of incapability is issued, nor does it establish any standards for such an assessment.

The PGT Guidelines recommend that the PGT arrange for a medical assessment, referred to by the PGT as a "physician preliminary opinion of incapability," as part of its investigation. In the files we reviewed, we found that the PGT typically arranged for a medical assessment. The *Patients Property Act* does not require that the physician knows the adult and has examined the adult recently. The Act also does not require physicians to follow practice guidelines or to complete a standard assessment report form. On 4 per cent of the files we reviewed, the medical assessment was conducted six months or more prior to the certificate of incapability being issued. On 14 per cent of the files, the medical assessment was conducted three to six months prior to the certificate. On 42 per cent of the files we reviewed, the physician conducting the assessment had known the adult for less than six months, including 9 per cent of files where the assessment was based on the physician's first meeting with the adult. Some files (12 per cent) did not indicate how long the physician knew the adult before completing the assessment. I found that a decision that an adult is incapable of managing his or her financial affairs is not legally required to be based on an assessment conducted by a physician.

We found inconsistencies in the thoroughness of the medical assessment reports we reviewed. There is no requirement for information to be provided to the adult before the assessment about the assessment process. Without minimum standards for medical assessments, there is a lack of certainty that a decision to issue a certificate of incapability will be based on current, accurate information about the adult's medical condition or that adults will be treated consistently.

When we reviewed the files, it became clear that physicians who are assessing an adult's incapability have varying involvement with the adult prior to conducting the assessment. This is concerning given the individual and the sometimes fluctuating nature of financial and legal capability.

(R4) I recommended that the Ministry of Justice take steps to require that all certificates of incapability are based on a current in-person assessment conducted by a physician.

(R5) I also recommended that the Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting medical assessments as part of the certificate of incapability process.

The Ministry of Justice has accepted these recommendations.

Informing the Adult about the Medical Assessment

The medical assessment is used by the PGT to decide whether or not to pursue a certificate of incapability. It is also one of the pieces of information that health authority staff consider when deciding whether or not to issue a certificate of incapability. As a matter of fairness, it is important that the adult is informed that the PGT has requested a medical assessment and that the adult understands the purpose of the assessment and its possible implications. It is also important that an adult is notified in advance of the assessment because an adult can decide whether or not to participate.

I found that when the Public Guardian and Trustee is investigating an adult's incapability, it does not routinely inform the adult

- that it has requested a medical assessment
- what the purpose of the medical assessment is
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how to obtain a copy of the medical assessment
- how to challenge the medical assessment or to request a reassessment

Although the assessment is requested for the purpose of the PGT investigation, the PGT leaves it to the physician to decide whether to and how to notify the adult about the assessment and what information to provide.

(R6) I recommended that when the Public Guardian and Trustee is investigating an adult's incapability, it inform the adult in writing that it has requested a medical assessment of the adult's incapability and

- the purpose of the medical assessment
- that the adult can refuse to be assessed
- that the adult can have a support person present
- how the adult can obtain a copy of the medical assessment, and
- how the adult can challenge the medical assessment or request a reassessment

The Public Guardian and Trustee has accepted this recommendation.

How the Medical Assessment Is Paid For

The PGT Guidelines state that if the PGT requests a medical assessment as part of its investigation, it will “coordinate” payment for the medical assessment and later recover the cost of the assessment from the adult if the PGT is appointed committee of the adult’s estate.⁵ The cost of the assessment usually ranges from \$50 to \$400 and, on rare occasions, may cost over \$1,000.⁶

The PGT does not inform the adult that the adult might be responsible for the cost of the medical assessment and it does not recover the cost of the assessment if the investigation does not result in a certificate of incapability, which occurs in nearly two thirds of its investigations.⁷

We considered the fairness of charging adults for the cost of the medical assessment if the PGT is appointed committee.⁸ Although an adult is presumed to be capable at the time the PGT requests the medical assessment, a fee is incurred for this assessment which can be recovered at a later date without the adult being made aware that he or she is incurring the fee and without the adult authorizing it. This is inconsistent with the legal presumption of capability.

While the Public Guardian and Trustee can receive monies spent in conducting investigations, I found that it was not fair and reasonable for the Public Guardian and Trustee to recover the cost of a medical assessment conducted during an investigation of an adult’s financial incapability from the adult’s estate after the Public Guardian and Trustee is appointed committee of the estate.

(R7) I recommended that the Public Guardian and Trustee seek authority and support from the provincial government to cover the costs of the medical assessment conducted during the investigation of financial incapability and stop recovering the costs from the adult’s estate after it becomes committee.

The Public Guardian and Trustee has accepted the first part of this recommendation but not the second part.

Health Authority Investigation

The Public Guardian and Trustee (PGT) Guidelines describe the health authority investigation as occurring after the PGT has completed its investigation; however, sometimes the health authority is involved earlier. The *Patients Property Act* does not set out a process to be followed by the health authorities in investigating an adult’s incapability.

⁵ Public Guardian and Trustee of British Columbia, *Guidelines for Issuing a Certificate of Incapability Under the Patients Property Act*, October 2011, 7 < http://www.trustee.bc.ca/pdfs/STA/Guidelines_for_issuing_Cert_Incapability_Fall_2011_FINAL.pdf >.

⁶ British Columbia Medical Association guidelines recommend that doctors charge approximately \$300 to complete the medical assessment form. British Columbia Medical Association, *Revised Fees For Uninsured Services Effective April 1, 2012*, 2 < https://www.bcma.org/files/Uninsured_Services1Apr2012.pdf >.

⁷ From 2007 to 2011, 41 per cent of the investigations conducted resulted in certificates of incapability being issued.

⁸ We did not consider the fairness of the practice of charging investigation fees to adults generally because PGT practice is to not charge an investigation fee for investigations of an adult’s financial incapability.

As a designated agency under the *Adult Guardianship Act*, a health authority may receive reports directly from concerned families, friends and others about suspected abuse and neglect, and investigate reports that an adult is abused or neglected.

In those cases, a health authority's involvement may include providing the PGT with collateral information, providing the medical assessment, reporting concerns to the PGT about a substitute decision-maker, investigating abuse or neglect reports or conducting a functional assessment in anticipation of a PGT request for a certificate.

A "functional assessment" is conducted or coordinated by the health authority and is separate from the medical assessment referred to in the previous section. A functional assessment involves examining the adult's ability to make financial decisions and carry out these decisions, as well as collecting other relevant information.

A decision to issue a certificate based solely on the medical assessment may reflect the adult's medical condition but not whether the adult is actually functioning capably on his or her own, or with the supports available to him or her. Both the medical and functional assessments play important roles in the process leading to the issuing of a certificate of incapability.

On 10 of the files we reviewed (18 per cent), there was no record of the health authority conducting a functional assessment. I found that the *Patients Property Act* does not require that a certificate of incapability be based on a functional assessment.

(R8) I recommended that the Ministry of Justice take steps to require that all certificates of incapability be based on both a medical and a functional assessment.

The Ministry of Justice has accepted this recommendation.

Staff Who Conduct Functional Assessments

There is no legally binding standard establishing who can conduct functional assessments, although we found that they are typically conducted by social workers, nurses, occupational therapists, psychologists, psychiatrists or doctors.

Health authorities estimated that staff who conduct functional assessments spend a small amount of their time performing this task compared to their other duties. Given the limited amount of time spent conducting assessments and the importance of the assessments, these staff should be properly trained and receive training on an ongoing basis. However, many of the staff we spoke to who conduct assessments said that they had not had training specific to functional assessments, and health authorities confirmed that they do not provide this training. I found that the health authorities do not consistently provide training to staff who conduct functional assessments.

(R9) I recommended that the Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before conducting functional assessments and ensure this training is provided on an ongoing basis.

The Ministry of Health has accepted this recommendation.

Before Conducting an Assessment

The *Patients Property Act* is silent on the process for conducting functional assessments, including whether an adult can have a support present during an assessment, and whether an adult can refuse to participate in an assessment. There are also no legislated requirements regarding notifying the adult of the assessment or providing information about the assessment before it is conducted. As a matter of fairness, an adult should be given timely notice of the process and the nature of the resulting decision and its possible implications. I found that the health authorities do not consistently provide adults with timely notice of and adequate information about functional assessments.

(R10) I recommended that the health authorities ensure that adults receive timely notice of and adequate information about functional assessments. The information provided to adults should include

- the purpose of the assessment
- that the adult can refuse to participate in the assessment
- that the adult can have a support person present
- how the adult can obtain a copy of the assessment and
- how the adult can challenge the assessment or request a reassessment.

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

The health authorities have accepted this recommendation.

(R11) I also recommended that the Ministry of Justice take steps to require in regulation that adults be provided with timely notice of and adequate information about functional assessments.

The Ministry of Justice has accepted this recommendation.

Assessment Process

The *Patients Property Act* does not include any requirements regarding functional assessments. While the PGT Guidelines provide some direction, the guidelines are not legally binding on health authorities. We were also told by some assessors that they were uncertain as to how they should be conducting incapability assessments and how they should be forming their opinions regarding incapability. In order to ensure consistency, minimum legally binding assessment standards should be established. I found that in the absence of legally binding minimum assessment standards health authority staff who conduct functional assessments follow different assessment practices resulting in inconsistent treatment for individual adults.

(R12) I recommended that the Ministry of Justice, in consultation with the Ministry of Health, include in regulation standards for conducting functional assessments as part of the certificate of incapability process.

The Ministry of Justice has accepted this recommendation.

After Conducting the Assessment

The health authority assessment is a key piece of information that is used by directors to decide whether a certificate of incapability will be issued. Given the possible implication of the assessment, it is important that an adult be able to obtain a copy of it. I found that the health authorities do not offer adults copies of their functional assessments. Only one health authority said that it provides copies of the assessment upon request.

(R13) I recommended that the health authorities offer adults copies of their functional assessments. If the adult wishes to receive a copy, any third-party information should be removed from the copy provided to the adult.

The health authorities have accepted this recommendation.

(R14) I also recommended that the Ministry of Justice take steps to require in regulation that adults are offered copies of their functional assessments.

The Ministry of Justice has accepted this recommendation.

Issuing a Certificate of Incapability

Certificates of incapability are issued by directors of provincial mental health facilities or psychiatric units and their delegates. Issuing a certificate is a legal decision that is usually based on medical and other information and evidence.

Health Authority Staff with Responsibility for Issuing Certificates

Given the significant impact issuing a certificate of incapability has, it is reasonable to expect that the person making this decision is well trained and sufficiently prepared for the task. However, none of the health authorities provide standard training to staff who issue certificates. I found that the Ministry of Health has not developed a training program for health authority staff who issue certificates of incapability.

Ensuring that training is required and provided is a province-wide responsibility, and it needs to occur in all of the health authorities. The Ministry of Health is in the best position to develop and implement this training.

(R15) I recommended that the Ministry of Health, in consultation with the health authorities, develop a provincial training program that must be completed by health authority staff before issuing certificates of incapability and ensure this training is provided on an ongoing basis.

The Ministry of Health has accepted this recommendation.

How Health Authority Staff Decide to Issue a Certificate

The *Patients Property Act* defines a patient as a person who is incapable of managing his or her affairs, but it does not define what it means for an adult to be incapable or establish any criteria or test for this determination. Neither the Public Guardian and Trustee (PGT) nor the health authorities have defined what incapable means.

The PGT Guidelines include a Director's Checklist for Issuing a Certificate of Incapability Under the *Patients Property Act* to provide some guidance to directors on what they should consider when issuing a certificate. Over half of the files we reviewed did not include a completed checklist.

It is difficult for a director to make an effective and fair decision about whether a person is incapable of managing his or her affairs when there are no clear criteria for what incapable really means. Without a test or definition, the director must rely on his or her own interpretation of what incapable means, and this can result in inconsistency as to how the term "incapable" is applied, and ultimately whether a certificate of incapability is issued. The result of not having clear criteria was demonstrated by the wide-ranging responses we received from directors about how they decide whether to issue a certificate of incapability. I found that the *Patients Property Act* does not define financial incapability or establish a test for determining when an adult is incapable of managing his or her finances.

(R16) I recommended that the Ministry of Justice take steps to establish a legally binding definition of financial incapability and a test for determining when an adult is incapable of managing his or her finances.

The Ministry of Justice has accepted this recommendation.

Notice of Intent to Issue a Certificate

A fundamental principle of administrative fairness is that a person has an opportunity to be heard before a decision that may adversely affect him or her is made. The *Patients Property Act* does not require a health authority to provide an adult with notice that it is intending to issue a certificate of incapability. The Act also does not require the health authority to provide the adult with an opportunity to respond before the certificate is issued.

The Public Guardian and Trustee's (PGT) Guidelines recommend that an adult and his or her family should be provided with appropriate notice from the health authority that the director intends to issue a certificate of incapability along with a summary of assessment. The guidelines indicate that the adult and his or her family should have 10 days to respond to the notice and provide any additional information to the director, though they do not specify how this notice should be sent or when the 10-day response period should begin.

Despite what the guidelines recommend, we found that many adults and their families did not receive notice before a certificate was issued or were not provided with 10 days to respond. Sixty per cent of the files we reviewed did not include a record that notice had been provided to the adult or a reason why no notice was provided. On 23 per cent of the files we reviewed, the adult was provided notice but given less than 10 days to respond. Eighty-two per cent of the files did not include a record that notice was provided to a family member. On nine per cent of files, the family member was provided less than 10 days to respond. This divergence between the recommended practice and the actual practice speaks to the shortcomings of having standards that are not mandatory or legally enforceable.

As mentioned above, the PGT Guidelines do not state how notice is to be provided. The stated policy of most health authorities is to send the notice letter by regular mail, and to provide 10 days from the date of the letter for the adult or family to respond. By the time the letter is received, the amount of time to respond could be much less than 10 days.

I found that there are no legally binding standards that require health authorities to:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice
- ensure that there is sufficient time for adults and families to respond to the notice

and health authority practices are inconsistent.

(R17) I recommended that when considering issuing a certificate of incapability, health authorities:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice
- ensure that there is sufficient time for adults and families to respond to the notice.

In exceptional circumstances, when the health authorities have concluded on reasonable grounds that providing notice would put an adult at risk, notice is not required.

The health authorities have accepted this recommendation.

(R18) I also recommended that the Ministry of Justice take steps to require in regulation that health authorities:

- notify adults and families of the intent to issue a certificate of incapability
- confirm that adults and families have received the notice and
- ensure that there is sufficient time for adults and families to respond to the notice.

The Ministry of Justice has accepted this recommendation.

Summary of Assessment

A fundamental principle of administrative fairness is that an adult should be provided with adequate and appropriate reasons for decisions that may affect him or her.

The *Patients Property Act* does not require a health authority to explain its reasons to an adult for deciding to issue a certificate of incapability. The Public Guardian and Trustee (PGT) Guidelines recommend that health authorities provide a summary of assessment to the adult and his or her family after the decision is made. Most of the health authorities believe they subscribe to this practice. We found, however, in only approximately 20 per cent of the files we reviewed that the summary of assessment had been provided to the adult.

The summaries of assessment we reviewed typically contained basic information such as the name of the adult and assessors, the date of assessments and the adult's diagnosis. Many of the summaries did not include enough information to explain why the certificate would be (or had been) issued. It would be difficult for the adult and his or her family member to challenge a certificate based on this information. I found that the health authorities do not adequately or consistently explain their reasons to the adult and his or her family for the decision to issue a certificate of incapability.

(R19) I recommended that the health authorities provide adults and families with adequate reasons in writing for the decision to issue a certificate of incapability.

The health authorities have accepted this recommendation.

(R20) I also recommended that the Ministry of Justice take steps to require that health authorities provide the adult and his or her family with adequate written reasons for the decision to issue a certificate of incapability.

The Ministry of Justice has accepted this recommendation.

Notification of a Certificate of Incapability

The Public Guardian and Trustee (PGT) Guidelines recommend that a copy of the certificate is to be provided to the adult. Despite this, most of the health authorities acknowledged that they do not provide a copy of the certificate to the adult or to his or her family. While the Fraser Health and Provincial Health Services Authority stated they provided a copy to the adult, there was no evidence of this practice on the files we reviewed for either health authority.

On 93 per cent of the files we reviewed, the health authorities did not inform the adult that they had issued a certificate of incapability. The PGT informs the adult that it is now responsible for assisting the adult with managing his or her financial and legal affairs. I found that the health authorities decide whether to issue a certificate of incapability, but they do not inform the adult and his or her family that a certificate has been issued and do not provide a copy of the certificate to the adult and his or her family once it has been issued.

(R21) I recommended that the health authorities inform adults and families of the decision to issue a certificate of incapability and provide them with a copy of the certificate.

The health authorities have accepted this recommendation.

(R22) I also recommended that the Ministry of Justice take steps to require that the health authority making the decision to issue a certificate of incapability is required to inform the adult and his or her family of its decision, and provide them with a copy of the certificate.

The Ministry of Justice has accepted this recommendation.

The notice that the PGT provides to the adult states that the PGT "has been given the legal responsibility to assist you with the management of your financial and legal affairs." It may be sent with a document that explains what it means when the PGT is committee of estate. The letter, however, does not state that the PGT is now the adult's committee of estate. I also found that the Public Guardian and Trustee does not provide clear notification to the adult and his or her family that it has been appointed committee of the adult's estate.

(R23) I recommended that the Public Guardian and Trustee ensure that it provides clear written notice to the adult and his or her family that it has been appointed as committee of the adult's estate and an explanation of what that means.

The Public Guardian and Trustee has accepted this recommendation.

Reassessment and Appeal

A decision that an adult is incapable of managing his or her finances is a significant decision that results in an adult losing the ability to manage his or her finances. Given the significance of the decision and the rights that are at stake, there should be a straightforward and accessible way to challenge it.

Information Provided to Adults

Though the decision to issue a certificate of incapability is made by a health authority director, the health authorities do not inform the adult of the decision. Only after it receives the certificate does the Public Guardian and Trustee (PGT) send the adult a document that explains briefly how committeehip may be terminated. The document does not describe the steps that an adult can take if he or she disagrees with the decision to issue a certificate of incapability. The PGT informed us that a person may also use its internal complaints process if he or she has a complaint. However, I found that the Public Guardian and Trustee does not inform adults about its internal complaint process when it becomes their committee of estate.

(R24) I recommended that the Public Guardian and Trustee inform adults about its internal complaint process when it becomes their committee of estate.

The Public Guardian and Trustee has accepted this recommendation.

Reassessment

The *Patients Property Act* states that a certificate of incapability can be reversed by a court or through a certificate of capability. In both cases, a reassessment of the adult may be required. Under the existing legislative framework, there is no provision that guarantees that the adult has access to a reassessment. At present, reassessment is at the discretion of the PGT and the health authorities. The PGT Guidelines suggest conducting a reassessment of an adult on the adult's request if six months have passed since the adult's assessment or reassessment, or if there is a change in his or her circumstances. If the adult is not successful in convincing the PGT or health authorities a new assessment is required, he or she may arrange for a reassessment privately, but the cost may have to be covered by a source other than the adult as his or her finances are controlled by the PGT.

Our interviews with health authority staff and our review of files where a reassessment had occurred revealed confusion about the appropriate procedure for conducting a reassessment. We also found that a clear process for determining when a reassessment will be approved by the PGT and the health authorities has not been established.

Having a clear process for reassessment to determine if guardianship is, or is still, necessary is consistent with the goal of having the least restrictive and least intrusive support in place. However, I found that the *Patients Property Act* does not require that an adult have access to a reassessment.

(R25) I recommended that the Ministry of Justice take steps to require that an adult has access to a reassessment on request before a certificate of incapability is issued and within a reasonable time frame after a certificate of incapability is issued.

The Ministry of Justice has not accepted this recommendation.

Appeal

The decision to issue a certificate of incapability results in a person losing control of his or her ability to make decisions about financial and legal matters. This is an important decision that affects an individual's autonomy and liberty.

Currently, people who wish to challenge a certificate of incapability have the following options available to them: seek a reassessment and a new decision from a health authority, seek judicial review or apply to the courts for a declaration of capability.

The *Patients Property Act* does not establish a mechanism that allows an adult to appeal a decision of financial incapability. As a matter of fairness, there should be an appropriate and accessible administrative appeal process for a decision that results in a person losing his or her right to make financial and legal decisions. I found that an adult who loses the ability to make his or her own financial and legal decisions as a result of an administrative decision to issue a certificate of incapability does not have access to an independent appeal of that decision.

Many administrative decisions in British Columbia are subject to an appeal or review by an independent tribunal. The decision that a person should no longer manage his or her financial and legal matters is certainly one significant enough to merit an appeal process. In both Yukon and Ontario, a legal and financial incapability decision can be appealed to an independent tribunal, which can confirm the original decision or substitute its own decision to declare an adult capable.

(R26) I recommended that the Ministry of Justice take steps to establish an appeal to a tribunal for an adult who wishes to dispute a decision that has found him or her incapable of managing his or her financial and legal affairs.

The Ministry of Justice has not accepted this recommendation.

Hiring a Lawyer after a Certificate is Issued

A committee of estate is an adult's litigation guardian, which means that the committee is responsible for deciding on behalf of the adult when to initiate legal action, when to retain legal counsel and how to instruct legal counsel. The *Patients Property Act* states that a person other than the committee of the adult's estate must not initiate a lawsuit on behalf of an incapable adult and that a lawsuit against an incapable adult must be brought against the adult's committee. An incapable adult can apply to court to appoint someone other than the PGT to act as the adult's litigation guardian.⁹

Although the PGT becomes the litigation guardian for adults when it is appointed committee of an adult's estate, the Ministry of Justice provided information supporting the view that an adult has a right to retain and instruct counsel in matters related to the determination of incapability.

An adult for whom a certificate of incapability has been issued should be informed that he or she can still retain and instruct counsel to challenge a certificate. Without being told otherwise, an adult may believe that hiring a lawyer to challenge a

⁹ *Supreme Court Family Rules*, B.C. Reg. 169/2009, s. 20-3(5), (11).

certificate of incapability in court is not an option available to him or her. I found that the Public Guardian and Trustee has not consistently communicated to adults that they have the right to retain counsel to challenge a certificate of incapability.

(R27) I recommended that when it becomes committee of estate, the Public Guardian and Trustee inform adults in writing that they can retain and instruct counsel to challenge a certificate of incapability.

The Public Guardian and Trustee has accepted this recommendation.

Duties of Committees and Committees Appointed by the Court

Duties of Committees under the *Patients Property Act*

Under the *Patients Property Act*, the Public Guardian and Trustee has complete authority to manage the adult's financial and legal affairs or the Public Guardian and Trustee has no authority at all.

Section 2(b) of the *Adult Guardianship Act* requires that the Act be administered and interpreted according to the principle that all adults should receive the most effective but the least restrictive and intrusive form of support, assistance or protections when they are unable to care for themselves or their financial affairs.¹⁰ I found that the *Patients Property Act* does not require a committee of estate to involve the adult in the management of his or her financial affairs.

By not requiring the guardian to involve the adult in the handling of his or her affairs, it fails to recognize that the adult may be capable in some aspects of managing his or her affairs. This does not promote the independence and autonomy of the adult.

(R28) I recommended that the Ministry of Justice take steps to require a committee to encourage the adult's participation in the decision making and management of the adult's financial affairs.

The Ministry of Justice has accepted this recommendation.

Committees Appointed by the Court

The court process that leads to the appointment of a committee of estate has more procedural safeguards than the administrative certificate process. Once the certificate process has been properly revised to ensure appropriate procedural safeguards, we would expect the Ministry of Justice, working in conjunction with the courts, will ensure that the court process incorporates similar protective provisions.

¹⁰ *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 2(b).

Conclusion

The work done in developing the *Adult Guardianship and Planning Statutes Amendment Act, 2007* together with these recommendations support Canada's obligations under the UN Convention on the Rights of Persons with Disabilities; are consistent with recommendations made by the Premier's Council on Aging and Seniors' Issues, and with adult guardianship laws in other Canadian jurisdictions.

This report has resulted in 21 findings and 28 recommendations. Seven recommendations were made to the Public Guardian and Trustee (PGT) to improve its practices and the PGT has accepted five of these in full and one in part. Five recommendations were made to the health authorities to improve their practices and the health authorities have accepted all five recommendations. Two recommendations were made to the Ministry of Health regarding developing provincial training programs for health authority staff who conduct assessments and who issue certificates. The Ministry of Health has accepted both recommendations.

Fourteen recommendations were made to the Ministry of Justice on actions that need to be taken to ensure that procedural safeguards are established in legislation or regulation. The Ministry of Justice has accepted 11 of those 14 recommendations, recommendations 4, 5, 8, 11, 12, 14, 16, 18, 20, 22 and 28 and has committed to implementing those recommendations by or before July 1, 2014. It has also accepted recommendation 3 and pending full implementation is looking at an interim measure that would move towards this goal. While the Ministry of Justice has not accepted recommendations 25 and 26 it has agreed to review those recommendations and report publicly on the results within 18 months.





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